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 United States of America

UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	Criminal Case No. 08CR1969-JM
	)	
Plaintiff,	)	DATE: July 25, 2008
	)	TIME: 11:00 a.m.
v.	)	Before Honorable Jeffery T. Miller
	)	
MANLEY SMITH (2),	)	UNITED STATES' RESPONSE TO
	)	DEFENDANT'S MOTIONS TO:
Defendant(s).	)	
	)	(1) PRESERVE EVIDENCE;
	)	(2) COMPEL DISCOVERY ;
	)	(3) COMPEL NOTICE PURSUANT TO
	)	FED. R. CRIM. P. 12(b)(4)(B);
	)	(4) DISMISS INDICTMENT DUE TO
	)	IMPROPER GRAND JURY; AND
	)	(5) GRANT LEAVE TO FILE
	)	FURTHER MOTIONS
	)	
	)	TOGETHER WITH STATEMENT OF
	)	FACTS AND MEMORANDUM
	)	OF POINTS AND AUTHORITIES

COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel, Karen P. Hewitt, United States Attorney, and W. Mark Conover, Assistant U.S. Attorney, and hereby files its Response to Defendant's Motions in the above-referenced case. Said Response is based upon the files and records of this case together with the attached statement of facts and memorandum of points and authorities.

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1 DATED: July 24, 2008.

2 Respectfully submitted,

3 KAREN P. HEWITT  
4 United States Attorney

5 s/ W. Mark Conover  
6 W. MARK CONOVER  
7 Assistant United States Attorney  
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Plaintiff,	)	DATE: July 25, 2008
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v.	)	Before Honorable Jeffery T. Miller
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MANLEY SMITH (2),	)	UNITED STATES' STATEMENT OF
	)	FACTS AND MEMORANDUM OF
Defendant(s).	)	POINTS AND AUTHORITIES
_____	)	

**I**

**STATEMENT OF THE CASE**

On June 13, 2008, Manley Lamont Smith (hereinafter "Defendant"), was indicted by a grand jury with violating 8 U.S.C. §§ 1324 (a)(1)(A)(ii), (a)(1)(B)(I), and (v)(II), Transportation of Illegal Aliens for Financial Gain and Aiding and Abetting. Defendant was arraigned on the Indictment on June 17, 2008, and entered a plea of not guilty.

**II**

**STATEMENT OF FACTS**

**A. DEFENDANT'S APPREHENSION**

On the evening of May 30, 2008, Border Patrol Agents met with three Wackenhut Corporation employees, including Transportation Officer ("T.O.") Vincent Reyes. T.O. Reyes

1 provided a four-page, typed and signed document outlining his observations of the actions of  
2 Wackenhut Sergeant Christopher SAINT-Lucero ("SAINT") that day. This document identified  
3 what T.O. Reyes believed was an alien smuggling event. In brief, the document and subsequent  
4 verbal account of T.O. Reyes stated the following:

5 T.O. Reyes reported that he and Sgt. SAINT were scheduled to work together. During the  
6 course of this shift they responded to several Border Patrol Stations and picked up aliens processed  
7 for voluntary returns to Mexico. They were operating their assigned marked Wackenhut MCI bus.  
8 T.O. Reyes was driving. T.O. Reyes and Sgt. SAINT transported the aliens to the San Ysidro Port  
9 of Entry and presented them to the Mexican immigration officers. One of the aliens, identified as  
10 Vidal Orellana-Cabrera ("Orellana"), (DOB 01/01/1964, FINS# 1075340875), was not allowed  
11 into Mexico because the Mexican immigration officers identified him as possibly being a  
12 Guatemalan citizen.

13 The Mexican immigration officer wrote "Guatem" alongside the alien's name on the I-216  
14 form (The I-216 Record of Departure form is used to document the departure of Mexican nationals  
15 to Mexico. The departure is physically verified by Mexican immigration officials at the Ports of  
16 Departure and the forms are stamped by the Mexican officials and are to be returned to the Border  
17 Patrol Station from which the Mexican nationals were apprehended.), sheet number 9265568.  
18 T.O. Reyes wrote "kick back" on the form alongside the alien's name. Sgt. SAINT directed T.O.  
19 Reyes to cross out "Guatem" and "kick back" from the I-216. T.O. Reyes then heard Sgt. SAINT  
20 say the following to Orellana; "How much money do you have?" "Do you have money or can you  
21 get money?" "Is it Los Angeles that you're going?" "Can you get money them (sic)?" "This will  
22 cost you about \$2,000.00 dollars." Orellana responded to Sgt. SAINT that he could get the money  
23 from Los Angeles.

24 T.O. Reyes then observed Sgt. SAINT place a call on his Nextel and heard him say, "It's  
25 what we talked about, and I have one. He can get the money in Los Angeles." T.O. Reyes said  
26 that upon receiving a "kick-back" from the San Ysidro Port of Departure their normal route of  
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1 travel would be to go to the Chula Vista Station via Beyer Boulevard whereupon the returned alien  
2 is taken back to the Chula Vista processing center and turned back over to the Border Patrol.

3 After this exchange, Sgt. SAINT instructed T.O. Reyes to drive to the east side of the San  
4 Ysidro Port of Entry and stop behind a section of buildings which was out of view of the port.  
5 This required that T.O. Reyes turn south onto East San Ysidro Boulevard from Camino De La Plaza  
6 where it turns north onto East Beyer Boulevard. Sgt. SAINT told T.O. Reyes to stop, whereupon  
7 Sgt. SAINT escorted Orellana off the bus telling him to proceed to the corner and wait. Sgt.  
8 SAINT directed T.O. Reyes to proceed around the block, circling the Grey Hound complex and  
9 upon nearing the corner where Orellana was standing, Sgt. SAINT told him to stop again. Sgt.  
10 SAINT got off the bus and approached Orellana. After a few minutes Sgt. SAINT returned to the  
11 bus, but upon seeing Orellana still standing at the corner, Sgt. SAINT said, "I told him to go to the  
12 flag poles". T.O. Reyes and Sgt. SAINT departed in the bus and as they passed the  
13 Jack-in-the-Box Restaurant, located at 721 East San Ysidro Boulevard, he observed Orellana  
14 walking towards the flag poles at the southwest corner of the restaurant. Sgt. SAINT then made  
15 contact with an unidentified subject via Nextel and informed him as to the location of Orellana.  
16 As T.O. Reyes drove the bus, Sgt. SAINT explained that he had this all worked out and would  
17 explain it to him. Sgt. SAINT suggested that T.O. Reyes obtain a Nextel radio. Sgt. SAINT  
18 explained that when T.O. Reyes got "kick-backs" from the port to call him and he could transport  
19 them in the (Wackenhut) Jeep and it would not be questioned. Sgt. SAINT went on to tell T.O.  
20 Reyes that he had done this about ten times already.

21 Agents assigned to the San Diego Sector Smuggling Interdiction Group (SIG) responded  
22 to this report by preparing to observe the alleged smuggling activity. On Sunday June 1, 2008, SIG  
23 Agent Ortiz was placed undercover in a holding cell at the Chula Vista Border Patrol Station in  
24 Chula Vista, California along with William Romero-Estrada, an undocumented alien from El  
25 Salvador. Agent Ortiz was in plain clothes and assumed the name Alberto Rodroquez-Osegueda  
26 and the date of birth 09/28/1973. He was listed as a citizen of Mexico and was presented as  
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1 processed for voluntary return to Mexico. Agent Ortiz and Romero were entered onto Bureau form  
2 I-216 Record of Departure along with five other Mexican nationals processed for voluntary returns  
3 under event number CHU0806000009.

4 At about 11:00 a.m., Wackenhut Sgt. SAINT arrived to transport Mexican nationals  
5 housed at the Chula Vista Border Patrol Station who were processed as voluntary returns to  
6 Mexico. Agent Ortiz and ROMERO were loaded into the bus and transported to the San Ysidro  
7 Port for Departure to Mexico. SIG Agents, all in plainclothes and operating unmarked DHS  
8 vehicles, conducted surveillance of the Wackenhut bus. The driver of the marked Wackenhut MCI  
9 bus, numbered 2049, was identified as to Otha Hayes. Sgt. SAINT was his assigned partner for  
10 this shift.

11 At the San Ysidro Port of Departure, all passengers were off-loaded and presented to the  
12 Mexican immigration officers for interview before being allowed to proceed into Mexico. Agent  
13 Ortiz was interviewed in turn by Mexican Immigration Officers. Agent Ortiz was questioned as  
14 to his citizenship. Agent Ortiz said he was from the State of Chiapas. When questioned as to  
15 where in Chiapas, Agent Ortiz said Santa Ana. The officer asked again where, to which Agent  
16 Ortiz again replied Santa Ana. The officer asked Agent Ortiz how old he was, Agent Ortiz said  
17 thirty-three years old. The officer asked Agent Ortiz what year he was born to which he replied  
18 1970, in conflict to the information printed on the presented Form I-216. This alerted the officer  
19 as it was not consistent with the information on the Form I-216, and Agent Ortiz was referred to  
20 another Mexican immigration officer for further questioning. When asked where he was from,  
21 Agent Ortiz said he was from El Salvador.

22 The Mexican immigration officer informed T.O. Hayes that Agent Ortiz was from El  
23 Salvador. T.O. Hayes yelled to Sgt. SAINT, who was several feet away, "This guy is an OTM."  
24 ("OTM" means "Other than Mexican"). Agent Ortiz was placed aside until the rest of the Mexican  
25 nationals could be interviewed. Romero approached the Mexican immigration officer at the  
26 voluntary return gate and was asked where he was from. Romero said he was from Chiapas as  
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1 well. The officer asked where in Chiapas to which Romero replied Santa Ana. The officer  
2 immediately referred Romero to the assisting immigration officer for further questioning. Romero  
3 admitted to the officer that he was also from El Salvador. Romero was placed alongside Agent  
4 Ortiz until such time that the rest of the individuals could be interviewed. The remaining  
5 occupants on the bus were accepted as voluntary returns and allowed to proceed into Mexico.

6 With a set of handcuffs in his hand, Sgt. SAINT approached Agent Ortiz and Romero.  
7 Agent Ortiz asked Sgt. SAINT in the Spanish language to give them a break to which he replied  
8 in the Spanish language, "Give you a break?" "Do you have any money?" Sgt. SAINT then placed  
9 handcuffs on Agent Ortiz and Romero and escorted them into the bus. T.O. Hayes remained with  
10 the rest of the group being voluntarily returned to Mexico. Once back on the bus, Sgt. SAINT  
11 asked Agent Ortiz and Romero where they were going to. Agent Ortiz and Romero said they were  
12 going to Los Angeles. Sgt. SAINT asked if they had money. Agent Ortiz said he didn't have any  
13 on him. Romero said he was going to originally pay \$3,000.00 dollars to be smuggled. Agent  
14 Ortiz then said he could pay \$1,000.00 dollars. Sgt. SAINT said O.K., let me make a call. Sgt.  
15 SAINT then instructed Agent Ortiz and Romero not to say anything else until later. Agent Ortiz  
16 observed Sgt. SAINT use his telephone to alert someone with what Agent Ortiz believed to be a  
17 Nextel phone.

18 As T.O. Hayes entered the bus to depart the area, Sgt. SAINT told him that he would take  
19 care of them (the kick-backs). While en route to the Chula Vista Station Sgt. SAINT told T.O.  
20 Hayes that he would take Agent Ortiz and Romero to the (Chula Vista) station in the Jeep. T.O.  
21 Hayes asked Sgt. SAINT why, since they were already going to the Chula Vista Station in the bus.  
22 Sgt. SAINT replied: "Just do, don't ask!" They proceeded to the Chula Vista Border Patrol  
23 compound but did not return to the processing building, rather stopping at the gasoline pumps on  
24 the far southern side of the compound.

25 As the Wackenhut bus was entering the Chula Vista Station compound via the Beyer  
26 Boulevard gate a marked Wackenhut Jeep Liberty, bearing California license plate 5WRM280,  
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1 was departing the compound. Sgt. SAINT jumped out of his seat abruptly and told T.O. Hayes to  
2 stop the bus. Sgt. SAINT got out, went to the driver of the Jeep, spoke to him briefly and walked  
3 back to the bus. The driver of the Jeep, identified as T.O. Manley Lamont SMITH drove the Jeep  
4 alongside the rear of the Wackenhut bus.

5 Sgt. SAINT then instructed T.O. Hayes to take a lunch break. Once T.O. Hayes departed,  
6 Sgt. SAINT directed Agent Ortiz and Romero to get off of the bus. Once out of the bus, Sgt.  
7 SAINT told Agent Ortiz and Romero to get in the Wackenhut Jeep. Agent Ortiz heard Sgt. SAINT  
8 say to T.O. SMITH in the English language, "\$5,000.00 bucks!" T.O. SMITH then said in the  
9 English language to Sgt. SAINT, "\$5,000.00!" in an excited tone of voice. T.O. SMITH told Sgt.  
10 SAINT, "I have my car here, I can take them or I can stash them until later." Sgt. SAINT told T.O.  
11 SMITH, "Let's see, let's go to your car." Sgt. SAINT then told T.O. SMITH, "I'll drop them off,  
12 call me later." T.O. SMITH drove the Wackenhut Jeep to his car, a black Jaguar bearing California  
13 license plate 5ZDJ068, and exited the Jeep. Sgt. SAINT got in the driver's seat of the Wackenhut  
14 Jeep and drove off, departing the Chula Vista compound with Agent Ortiz and Romero handcuffed  
15 in the back seat.

16 Once in the Jeep, in the Spanish language Sgt. SAINT informed Agent Ortiz and Romero  
17 that he would take them to a park near the Border Patrol Station and make arrangements to pick  
18 them up. Sgt. SAINT said he was the law, the authority and to do as he says. Sgt. SAINT said not  
19 to worry because he was the law. Sgt. SAINT said to Agent Ortiz and Romero they would not get  
20 caught and they would make it to Los Angeles, he would see to it. Sgt. SAINT said once in Los  
21 Angeles they would call their families to make the payment arrangements. Sgt. SAINT said to wait  
22 at the park and not to leave or speak to anyone. Sgt. SAINT said to Agent Ortiz and Romero not  
23 to walk around because there were a lot of Border Patrol Agents around. Sgt. SAINT said if they  
24 left the park, he would find them and they would pay for it.

25 Sgt. SAINT proceeded to transport Agent Ortiz and Romero to the Howard Lane  
26 Neighborhood Park located on the northwest corner of the intersection of Dairy Mart Road and  
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1 Beyer Boulevard. Agent Ortiz observed Sgt. SAINT drive around the block. After doing so, Sgt.  
2 SAINT again instructed Agent Ortiz and Romero to remain at the park or they would pay for it.  
3 Sgt. SAINT handed Romero a handcuff key and told them to take the cuffs off. At approximately  
4 12:00 noon, Sgt. SAINT pulled up along the curbside on Dairy Mart Road and instructed Agent  
5 Ortiz and Romero to get out and walk to the area where they were to wait.

6 Approximately an hour later, at about 1:20 p.m., Border Patrol Agents conducting  
7 surveillance observed a black Toyota Tundra pickup bearing California license plate 8J45800, with  
8 Sgt. SAINT behind the wheel. Sgt. SAINT parked at the southwest corner of the park, lowered  
9 his passenger side rear window and motioned with his hand to Agent Ortiz and Romero to come  
10 to the truck. Agent Ortiz and Romero slowly approached the vehicle afoot. Agent Hansen advised  
11 all units in the area to slowly approach the Toyota. Agent Ortiz opened the rear door of the truck  
12 and Romero entered the Toyota sitting in the rear seat. Agent Ortiz opened the passenger's side  
13 front door. Agent Ortiz observed that Sgt. SAINT was still in full duty uniform with badge and  
14 duty holster including his service issued firearm. Agent Ortiz identified himself as a federal agent  
15 and ordered Sgt. SAINT to raise his hands and not to move. Sgt. SAINT complied. Numerous  
16 Border Patrol Agents then converged on the Toyota. Agent Ortiz placed Sgt. SAINT under arrest  
17 for suspicion of alien smuggling. Sgt. SAINT, the black Toyota Tundra and Romero were taken  
18 to the Chula Vista Border Patrol Station for processing. Sgt. SAINT was in possession of three  
19 cellular telephones, all of which were seized as evidence. SAINT's duty belt and weapon were  
20 seized. His weapon was a .40 caliber Smith and Wesson semi-automatic, fully loaded with a  
21 10-round magazine and one round in the chamber. SAINT's duty belt contained two additional  
22 fully loaded 10-round magazines. The ammunition was S&W .40 caliber hollow point.

23 At about 1:45 p.m., Agents Ortiz, Rodriguez, Hansen and Harkenrider walked into to the  
24 Wackenhut office, on the Chula Vista Border Patrol compound. Agents observed T.O. SMITH  
25 sitting at a desk near the doorway. T.O. SMITH was in full duty uniform with his service issued  
26 firearm on his person. Agents placed T.O. SMITH under arrest for suspicion of alien smuggling.

1 Agents walked T.O. SMITH to the Chula Vista Border Patrol Station for processing. While  
2 walking, without having been asked any questions, T.O. SMITH stated, "Oh, I know what this is  
3 about, I know now." SMITH was in possession of five cellular telephones, all of which were  
4 seized as evidence. SMITH's duty belt and weapon were seized. His weapon was a .40 caliber  
5 Smith and Wesson semi-automatic, fully loaded with a 10-round magazine and one round in the  
6 chamber.

7 Agent Hansen met with Wackenhut Lt. Cabusora in the late afternoon of June 1, 2008, and  
8 seized the I-216 from today's event as well as the I-216 from Friday's event (5/30/08). The I-216  
9 regarding today's event indicated that both Agent Ortiz and Romero had been voluntarily returned  
10 to Mexico. There was no indication that they had been denied entry into Mexico.

11 **B. POST-MIRANDA STATEMENT OF CRISTOPHER SAINT-LUCERO**

12 At 7:24 p.m. on June 1, 2008, SAINT provided SIG Agent Andrew Kahl with a videotaped  
13 post-Miranda statement in the English language, which is summarized as follows:

14 SPA Kahl read SAINT his Miranda rights in the English language and asked if he had  
15 understood those rights. SAINT said that he understood his rights, and that he was willing to  
16 answer questions without the presence of an attorney. When asked about his employment, SAINT  
17 stated that he is employed as the swing shift supervisor and Sergeant of Transportation Officers  
18 for Wackenhut, and in which capacity he serves as a contract Transportation Officer (T.O.) for the  
19 Border Patrol. When asked to explain how he had become involved in the smuggling of  
20 undocumented aliens, SAINT stated that he and a Wackenhut co-worker of his, whom he identified  
21 as Manley SMITH, had lived in Tijuana together as roommates and had rented a large house in  
22 Calle Cucapah, from a subject known as "Ernesto" and his wife, whose name he believed was  
23 Claudia MEDINA.

24 SAINT stated that he had explained to "Ernesto" that he worked as a T.O. for Wackenhut  
25 and that he moved detainees for the Border Patrol. "Ernesto" told him that smuggled aliens were  
26 worth a lot of money. He told SAINT that if he ever had any undocumented aliens available, that  
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1 he could take them off his hands and that there was good money in it. "Ernesto" stated that he had  
2 somebody who would take and smuggle the undocumented aliens. "Ernesto" told SAINT that he  
3 would give him half of whatever he earned per alien. SAINT stated that he interpreted this to  
4 mean that he personally would get about \$1,000.00 (USD), but said that the exact amount was  
5 never specified. "Ernesto" told SAINT to call him if he ever has an alien to hand over and that he  
6 could come and pick the subject up.

7 SAINT stated that the first time that he decided to pursue "Ernesto's" offer was last  
8 Saturday, May 30, 2008, when SAINT was working together with another T.O. named REYES.  
9 SAINT stated that the only other time that he had ever attempted to smuggle any detainees was  
10 today, June 1, 2008.

11 SAINT stated that T.O. Hayes told him that two of the detainees had turned out to be  
12 OTMs from Guatemala. He said that the two aliens were separated and that they handcuffed them  
13 and placed them back on the bus. SAINT asked them where they were going to be smuggled to,  
14 and the two of them said that they were being smuggled to Los Angeles. He asked if they had  
15 someone waiting for them, and they stated that they did. He asked them how much they were to  
16 have paid, and one of the aliens stated that he had been tricked by a smuggler who had taken his  
17 money. The other alien stated that he had access to \$1,500.00 (USD). SAINT told them that he  
18 knew a guy who could take them north and that it was a sure thing and that the guy was honest and  
19 wouldn't trick them. He asked if they wanted him to contact this guy and they told him, "Yes."

20 SAINT stated that he told T.O. Hayes that they were going back to Chula Vista Station.  
21 He stated that it was his intention to hand these two aliens over to "Ernesto" in exchange for half  
22 of whatever the smuggling fee would have been. Upon arriving at Chula Vista Station, SAINT  
23 stated that he told T.O. Hayes that he could go ahead and break for lunch, and that he would take  
24 care of dropping off the aliens at Chula Vista. He stated that T.O. Hayes then got in his personal  
25 vehicle and drove away.

1 SAINT said that as this was happening he saw T.O. SMITH arriving in the van, parking  
2 it and getting the marked Wackenhut Jeep. He stated that he flagged T.O. SMITH down and said  
3 that he had two OTMs. He stated that he had previously mentioned to T.O. SMITH that "Ernesto"  
4 their prior landlord, had offered to take aliens off his hands for a percentage of the smuggling fee.  
5 SAINT stated that T.O. SMITH appeared to already realize that he didn't really plan on bringing  
6 the aliens back to Chula Vista Station. He then stated to T.O. SMITH that he had made a deal with  
7 the aliens and that he was trying to hand them over to "Ernesto" but that "Ernesto" wasn't  
8 answering his phone. He then stated to T.O. SMITH that OTMs were worth a lot of money, about  
9 \$2,500.00 (USD) each, which would total \$5,000.00, implying that the two of them could share  
10 whatever the profit was. SAINT stated that T.O. SMITH was obviously interested and stated "OK"  
11 and offered to use his personal car, a black Jaguar S-Type. When SAINT told him that he was  
12 going to use the Jeep, T.O. SMITH asked him if he wanted him to follow in his Jaguar. He told  
13 T.O. SMITH that he didn't think that it would be necessary, but that he would call him if he needed  
14 anything like that. SAINT stated that he hadn't even been able to reach "Ernesto" and that there  
15 wasn't much point in him driving the aliens around if he couldn't get in touch with him. He then  
16 told T.O. SMITH that he was going to do a few laps around the block in the Jeep and see if he  
17 could get in touch with "Ernesto" and that if that failed, he would just return the aliens to Chula  
18 Vista Station. T.O. SMITH stated to him "OK" and told SAINT to give him a call if he needed  
19 him to come in his car.

20 SAINT stated that he pulled out of Chula Vista Station after driving a short distance he had  
21 still not heard from "Ernesto" and so he explained to the two aliens that he couldn't reach his guy,  
22 and then proposed that he drop them off at the park, telling them to stay in that exact spot, so that  
23 the guy could find them, pick them up and take them north. He told them not to walk around or  
24 go anywhere, since it was close to the Border Patrol Station and it was likely that they would be  
25 arrested. SAINT returned to pick up the aliens and pulled up to the park in his Tundra and  
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1 motioned for the two Aliens to get in his truck. As they loaded into the vehicle a bunch of agents  
2 came up and arrested him.

3 SAINT was asked by Agent Kahl for permission to access and search the memory of his  
4 Motorola i880 Boost phone, and he granted SPA Kahl consent to search the memory of his phone.

5 **C. POST-MIRANDA STATEMENT OF MANLEY LAMONT SMITH**

6 At 5:47 p.m. on June 1, 2008, SMITH provided SIG Agent Andrew Kahl with a videotaped  
7 post-Miranda statement in the English language, which is summarized as follows:

8 SPA Kahl read SMITH his Miranda rights in the English language and asked if he had  
9 understood those rights. SMITH said that he understood his rights, and that he was willing to  
10 answer questions without the presence of an attorney. SMITH stated that he understood why he  
11 had been placed under arrest.

12 SMITH stated that he is a United States citizen and that he was born in York, Pennsylvania  
13 on 08/23/69. He currently lives in National City, California. He said he used to live with SAINT,  
14 but SAINT had cheated him out of some money. When asked where they had rented, SMITH  
15 started to respond, stammered and indicated that he wanted to leave it at that and not go awry.  
16 When asked about his employment, SMITH stated that he is employed as a day shift supervisor  
17 for Wackenhut, and in which capacity he serves as a contract Transportation Officer (T.O.) for the  
18 Border Patrol. He used to be a private security officer. SMITH stated that he has worked for  
19 Wackenhut since the contract began in December of 2006. SMITH said he has a current "guard  
20 card" and firearms permit. SMITH said he worked graveyard shift, and now days. SMITH said  
21 he and SAINT have been employed together at Wackenhut since the contract began. SMITH  
22 stated that he has an application in as a police officer for Los Angeles International Airport  
23 (L.A.X.) Police Department and that he had just been accepted.

24 On today's date, SMITH said he did a juvenile run, where he transports juvenile aliens from  
25 the San Ysidro Port Enforcement Team to the VR gate, accompanied by a Mexican Consular  
26 Official. At about 11:00 a.m. he had just dropped off the consular officer and was returning his  
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1 assigned Wackenhut van when Sgt. SAINT called him stating he needed the van to transport aliens  
2 from Chula Vista. He was told there were ten more people than would fit in the bus. SMITH said  
3 he suggested that they have the next shift do it, but SAINT said they should do it all now. SMITH  
4 said he was in a Jeep at the time, having dropped the van off at the compound, so he returned and  
5 got back into the van. After loading the ten people into the van, he followed the bus to the POE  
6 and unloaded his people with those from the bus.

7 SMITH then went to get his I-216 for the juvenile run, which the Mexican consulate had  
8 kept. SAINT asked SMITH what else he needed to do today and SAINT told him to do his trip  
9 logs and go home. SMITH said his shift didn't end until 2:00 p.m., SMITH said he said thanks,  
10 but then remembered about the Lieutenant and realized he could not go home, because he calls  
11 them constantly and checks up on them. SMITH went to the pumps (Chula Vista Station  
12 compound) and dropped off the van and was getting into the Jeep when he saw SAINT and Hayes  
13 had arrived in the bus.

14 SAINT waved him down and said that he had two prisoners. SMITH asked him if they  
15 were OTMs. SAINT said that they were, and then took two people off the bus in handcuffs and  
16 put them in the Jeep. SMITH said he asked SAINT if he was taking them down to Chula Vista  
17 Station, and SAINT said "No, they offered me \$5,000.00 apiece" SMITH said he replied, "Oh  
18 really, yeah right," because SAINT is always joking like that. SAINT again said that they offered  
19 \$5,000.00 apiece, and SMITH said he replied, "Oh, OK, I got my car here," jokingly. SAINT then  
20 asked SMITH if he remembered Claudia and her husband, he responded that he did. When asked  
21 about his interpretation of SAINT's statement that the aliens had offered him \$5000.00, he stated  
22 that the only thing which occurred to him was that the aliens had offered SAINT \$5000.00 to let  
23 them go, but that he didn't take it seriously.

24 SMITH said he thought that Hayes was still on the bus. While driving to the barracks  
25 SMITH said that SAINT said something which he did not hear. SAINT asked him which car he  
26 had, to which SMITH said, "My Jaguar". SMITH explained that he owns a black 2003 Jaguar  
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1 S-type. SMITH stated that he could not remember what SAINT's response had been to his  
2 statement that he had his Jaguar. At the barracks SMITH then got out of the Jeep and SAINT  
3 drove off around the corner. SMITH stated that at no time did he believe that SAINT was really  
4 going to let the aliens go and that he had not taken him seriously. He stated that at no time did he  
5 actually offer to go get the Jaguar nor did he offer SAINT the use of his Jaguar. He said that  
6 SAINT did not ask to be allowed to use it either. He stated that he did not offer to help SAINT or  
7 agree to participate in setting the aliens free or smuggling them. SMITH stated that he fully  
8 believed that SAINT was going to drive around the corner and drop off the aliens at the Chula  
9 Vista processing center. He characterized his exchange with SAINT as him making a flippant  
10 remark to SAINT in a joking fashion, and nothing more.

11 When asked whether it was common practice to transport detainees around in the uncaged  
12 Wackenhut Jeep, SMITH stated that this was commonly done. When asked if it was normal to  
13 change the "kicked-back" detainees from one vehicle to another, instead of driving them straight  
14 back to the Chula Vista processing center, SAINT stated that this was also commonly done.  
15 SMITH said that, upon entering the office, he then called a female friend, whom he identified as  
16 Andrea Martinez, and told her what his Sergeant had said to him. SMITH said that the Sergeant  
17 had told him these guys had offered him \$5,000.00. He told her that SAINT is always joking but  
18 that he seemed to have a serious tone in his voice this time. She told him that it wasn't worth  
19 anybody's job. He said "Yeah, but \$5,000.00, that's just hilarious." She said she hoped he wasn't  
20 thinking about doing it. He said he was not, "but \$5,000.00 will get you, we're always talking  
21 about, a motorcycle. I'm just selling my car for \$3,000.00 and they offer \$5,000.00 to do that", but  
22 he agreed that he wouldn't do it. She said that she didn't want to hear about it and asked him why  
23 he was telling her about this. SMITH said he answered that she was always saying that they never  
24 communicated, and that was why he was telling her.

25 SMITH said that SAINT returned and stated that he had not answered his phone. SMITH  
26 said he left his phone on the desk, and that it was on vibrate. SMITH asked whether SAINT had  
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1 dropped the aliens off at Chula Vista Station, to which SAINT said that he had. SMITH said he  
2 understood how someone observing his actions and his conversation with SAINT could conclude  
3 that he was a willing participant in the smuggling event and that he was "in on it." When asked  
4 if he believed that SAINT had committed a crime by suborning him and offering him money to  
5 help let the aliens go, SMITH stated that he didn't think so, and that he had simply thought that it  
6 was a joke and hadn't taken it seriously.

7 When asked about the I-216 manifest which pertained to the two aliens SAINT had left  
8 with, SMITH said that he didn't know if one had been submitted or what the actual I-216 did in  
9 fact reflect regarding those two aliens, and that it would have been Sgt. SAINT's responsibility to  
10 submit that paperwork.

11 Agent Kahl asked SMITH for consent to access and search the memory of his cell phone,  
12 and SMITH granted him consent.

13 **C. STATEMENT OF MATERIAL WITNESS WILLIAM ROMERO-ESTRADA**

14 At 4:09 p.m. on 06/02/08 material witness William Edgardo Romero-Estrada provided  
15 Agent Kahl with a videotaped sworn statement in the Spanish language, which is summarized as  
16 follows:

17 Romero stated that he was born in Santa Ana, El Salvador on 10/28/70. Romero stated that  
18 he does not have nor has he ever had any immigration documents allowing him to be in or remain  
19 legally in the United States. Romero stated that he was to be smuggled to Los Angeles, California,  
20 and that he was to have been charged a \$3,000.00 (USD) smuggling fee. Romero stated that he  
21 made the arrangements to be smuggled from Tijuana, B.C., Mexico. Romero stated that he was  
22 crossed through "El Hongo," near Tecate, B.C., Mexico last Thursday. He stated that he was then  
23 caught on Friday about 3:00 a.m.

24 After being taken to and processed at the Border Patrol Station Romero stated that he was  
25 asked by Border Patrol agents if he would do something honorable. He was asked and agreed to  
26 accompany an undercover Agent on a bus of aliens being returned to Tijuana via the Port-of-Entry  
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1 (in San Ysidro). The Officer was pretending to be an undocumented alien. Upon his arrival at the  
2 POE, Romero was asked to tell the Mexican Officers that he was from Santa Ana, Chiapas so that  
3 the Mexican Officers would not accept them and they would be kicked back to the (transportation)  
4 Officers when it was discovered that they were not Mexican. They were put aside by the Mexican  
5 Officers until all subjects were interviewed and admitted into Mexico. Romero said that he was  
6 then handcuffed to the Agent by the Officers in gray uniforms and returned to the bus.

7 Romero stated that he was then asked by the one of the officers from the bus (described as  
8 fair skinned, fat 1.8M tall with dark glasses) if he had any money. Romero said he put his hands  
9 in his pockets and the Officer immediately told him to "be discreet." Romero stated that he was  
10 asked, "Do you have someone to pay for you?" He stated that both he and the Agent said that they  
11 had someone in Los Angeles who would pay for them. Romero didn't say anything else as they  
12 were driven back to the Chula Vista station. Romero stated that a black Officer, referring to  
13 SMITH, parked the bus. Another black Officer dressed in gray arrived. Romero stated that he was  
14 shorter than the driver. He said they spoke in English and he did not understand them. Romero  
15 stated that the shorter Officer parked a vehicle, (with large letters on it) next to the bus. He stated  
16 that it was a "small SUV". Romero stated that they pulled the vehicle close to the bus as if to move  
17 the two of them into the SUV without being seen. Romero stated they were then driven to an  
18 office, the shorter black guy got out and the "fat" white guy drove them out of the gate of the  
19 station.

20 Romero stated that they went in the SUV for several blocks. The driver spoke to them  
21 again and asked, "How much will your family in L.A. pay for you". Romero said \$3,000.00, and  
22 he said the Agent said \$1,000.00. He said that the driver told them, "I am the law here, don't  
23 worry, nothing will happen to you, do everything I say." He asked the officer if he could un-cuff  
24 them and the officer gave them a handcuff key. Romero said that he removed his handcuffs and  
25 the Agent removed his. The Officer took the handcuffs and threw them on the seat beside him.

1 The Officer told him that he was going to leave them in a park, not to separate or leave that spot,  
2 and not to flee because he would find them, and things would go badly if they did.

3 A short time later a civilian double-cab pickup truck, dark brown or red, came by and made  
4 a u-turn. The driver of the pickup motioned to them three times to wait. He was driving slowly.  
5 He went out of their view and returned after 4-5 minutes. He stopped and gestured with his hand  
6 for them to come. Romero stated that the Agent went to get into the rear, driver side of the pick-up  
7 and he entered the passenger side rear door. Romero stated the Agent then drew and pointed his  
8 weapon at the driver, who was picking them up still dressed in his gray uniform. Romero says that  
9 he helped the Agent to secure the driver. Romero said that they were surrounded by about seven  
10 Agents within two seconds.

11 Romero says that the driver was placed into a marked, caged sedan. After returning to the  
12 station Romero says that the Agents arrested the other officer that had moved the vehicle to the bus  
13 for them to be loaded into. Romero was shown two six photograph lineup folders: In folder "A"  
14 he identified photo #2 as the Officer that pulled the Jeep up to the bus so that they could be loaded  
15 into it without being seen. Photograph #2 in photo lineup "A" depicts defendant SMITH.  
16 In folder "B" he identified photo #5 as the Officer that brought them to the park in the Jeep and  
17 later tried to pick them up in his pick-up truck. Photograph #5 in photo lineup labeled "B" depicts  
18 defendant SAINT.

### 19 III

#### 20 MEMORANDUM OF POINTS AND AUTHORITIES

#### 21 A. DISCOVERY REQUESTS AND MOTION TO PRESERVE EVIDENCE

##### 22 1. The Government Has or Will Disclose Information Subject To Disclosure 23 Under Rule 16(a)(1)(A) and (B) Of The Federal Rules Of Criminal Procedure

24 The government has disclosed, or will disclose well in advance of trial, any statements  
25 subject to discovery under Fed. R. Crim. P. 16(a)(1)(A) (substance of Defendant's oral statements  
26 *in response to government interrogation*) and 16(a)(1)(B) (Defendant's relevant written or  
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1 recorded statements, written records containing substance of Defendant's oral statements *in*  
2 *response to government interrogation*, and Defendant's grand jury testimony).

3 a. The Government Will Comply With Rule 16(a)(1)(D)

4 To the extent he has a criminal record, Defendant has already been provided with his or her  
5 own "rap" sheet and the government will produce any additional information it uncovers regarding  
6 Defendant's criminal record. Any subsequent or prior similar acts of Defendant that the  
7 government intends to introduce under Rule 404(b) of the Federal Rules of Evidence will be  
8 provided, along with any accompanying reports, at a reasonable time in advance of trial.

9 b. The Government Will Comply With Rule 16(a)(1)(E)

10 The government will permit Defendant to inspect and copy or photograph all books, papers,  
11 documents, data, photographs, tangible objects, buildings or places, or portions thereof, that are  
12 material to the preparation of Defendant's defense or are intended for use by the government as  
13 evidence-in-chief at trial or were obtained from or belong to Defendant.

14 Reasonable efforts will be made to preserve relevant physical evidence which is in the  
15 custody and control of the investigating agency and the prosecution, with the following exceptions:  
16 drug evidence, with the exception of a representative sample, is routinely destroyed after 60 days,  
17 and vehicles are routinely and periodically sold at auction. Records of radio transmissions, if they  
18 existed, are frequently kept for only a short period of time and may no longer be available.  
19 Counsel should contact the Assistant United States Attorney assigned to the case two weeks before  
20 the scheduled trial date and the Assistant will make arrangements with the case agent for counsel  
21 to view all evidence within the government's possession.

22 c. The Government Will Comply With Rule 16(a)(1)(F)

23 The government will permit Defendant to inspect and copy or photograph any results or  
24 reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof,  
25 that are within the possession of the government, and by the exercise of due diligence may become  
26 known to the attorney for the government and are material to the preparation of the defense or are  
27

1 intended for use by the government as evidence-in-chief at the trial. Counsel for Defendant should  
2 contact the Assistant United States Attorney assigned to the case and the Assistant will make  
3 arrangements with the case agent for counsel to view all evidence within the government's  
4 possession.

5  
6 d. The Government Will Comply With Its Obligations Under Brady v. Maryland

7 The government is well aware of and will fully perform its duty under Brady v. Maryland,  
8 373 U.S. 83 (1963), and United States v. Agurs, 427 U.S. 97 (1976), to disclose exculpatory  
9 evidence within its possession that is material to the issue of guilt or punishment. Defendant,  
10 however, is not entitled to all evidence known or believed to exist that is, or may be, favorable to  
11 the accused, or that pertains to the credibility of the government's case. As stated in United States  
12 v. Gardner, 611 F.2d 770 (9th Cir. 1980), it must be noted that:

13 [T]he prosecution does not have a constitutional duty to disclose every bit of  
14 information that might affect the jury's decision; it need only disclose information  
favorable to the defense that meets the appropriate standard of materiality.

15 611 F.2d at 774-775 (citations omitted). See also United States v. Sukumolachan, 610 F.2d 685,  
16 687 (9th Cir. 1980) (the government is not required to create exculpatory material that does not  
17 exist); United States v. Flores, 540 F.2d 432, 438 (9th Cir. 1976) (Brady does not create any  
18 pretrial privileges not contained in the Federal Rules of Criminal Procedure).

19 e. Discovery Regarding Government Witnesses

20 (1) Agreements. The government has disclosed or will disclose the  
21 terms of any agreements by Government agents, employees, or attorneys with witnesses that testify  
22 at trial. Such information will be provided at or before the time of the filing of the Government's  
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1 trial memorandum.<sup>1/</sup> The government will comply with its obligations to disclose impeachment  
 2 evidence under Giglio v. United States, 405 U.S. 150 (1972).

3 (2) Bias or Prejudice. The government has provided or will provide  
 4 information related to the bias, prejudice or other motivation to lie of government trial witnesses  
 5 as required in Napue v. Illinois, 360 U.S. 264 (1959).

6 (3) Criminal Convictions. The government has produced or will  
 7 produce any criminal convictions of government witnesses plus any *material* criminal acts which  
 8 did not result in conviction. The government is not aware that any prospective witness is under  
 9 criminal investigation.

10 (4) Ability to Perceive. The government has produced or will produce  
 11 any evidence that the ability of a government trial witness to perceive, communicate or tell the  
 12 truth is impaired or that such witnesses have ever used narcotics or other controlled substances,  
 13 or are alcoholics.

14 (5) Witness List. The government will endeavor to provide Defendant  
 15 with a list of all witnesses which it intends to call in its case-in-chief at the time the government's  
 16 trial memorandum is filed, although delivery of such a list is not required. See United States v.  
 17 Dischner, 960 F.2d 870 (9th Cir. 1992); United States v. Culter, 806 F.2d 933, 936 (9th Cir.  
 18 1986); United States v. Mills, 810 F.2d 907, 910 (9th Cir. 1987). Defendant, however, is not  
 19 entitled to the production of addresses or phone numbers of possible government witnesses. See  
 20 United States v. Thompson, 493 F.2d 305, 309 (9th Cir. 1977), cert. denied, 419 U.S. 834 (1974).  
 21 Defendant has already received access to the names of potential witnesses in this case in the  
 22 investigative reports previously provided to him or her.

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23  
 24  
 25 <sup>1</sup> As with all other offers by the government to produce discovery earlier than it is required  
 26 to do, the offer is made without prejudice. If, as trial approaches, the government is not prepared  
 27 to make early discovery production, or if there is a strategic reason not to do so as to certain  
 28 discovery, the government reserves the right to withhold the requested material until the time it is  
 required to be produced pursuant to discovery laws and rules.

1 (6) Witnesses Not to Be Called. The government is not required to  
2 disclose all evidence it has or to make an accounting to Defendant of the investigative work it has  
3 performed. Moore v. Illinois, 408 U.S. 786, 795 (1972); see United States v. Gardner, 611 F.2d  
4 770, 774-775 (9th Cir. 1980). Accordingly, the government objects to any request by Defendant  
5 for discovery concerning any individuals whom the government does not intend to call as  
6 witnesses.

7 (7) Favorable Statements. The government has disclosed or will  
8 disclose the names of witnesses, if any, who have made favorable statements concerning Defendant  
9 which meet the requirements of Brady.

10 (8) Review of Personnel Files. The government has requested or will  
11 request a review of the personnel files of all federal law enforcement individuals who will be called  
12 as witnesses in this case for Brady material. The government will request that counsel for the  
13 appropriate federal law enforcement agency conduct such review. United States v. Herring, 83  
14 F.3d 1120 (9th Cir. 1996); see, also, United States v. Jennings, 960 F.2d 1488, 1492 (9th Cir.  
15 1992); United States v. Dominguez-Villa, 954 F.2d 562 (9th Cir. 1992).

16 Pursuant to United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991) and United States v.  
17 Cadet, 727 F.2d 1452 (9th Cir. 1984), the United States agrees to “disclose information favorable  
18 to the defense that meets the appropriate standard of materiality . . .” United States v. Cadet, 727  
19 F.2d at 1467, 1468. Further, if counsel for the United States is uncertain about the materiality of  
20 the information within its possession in such personnel files, the information will be submitted to  
21 the Court for in camera inspection and review.

22 (9) Government Witness Statements. Production of witness statements  
23 is governed by the Jencks Act, 18 U.S.C. § 3500, and need occur only after the witness testifies  
24 on direct examination. United States v. Taylor, 802 F.2d 1108, 1118 (9th Cir. 1986); United States  
25 v. Mills, 641 F.2d 785, 790 (9th Cir. 1981)). Indeed, even material believed to be exculpatory and  
26 therefore subject to disclosure under the Brady doctrine, if contained in a witness statement subject  
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1 to the Jencks Act, need not be revealed until such time as the witness statement is disclosed under  
2 the Act. See United States v. Bernard, 623 F.2d 551, 556-57 (9th Cir. 1979).

3 The government reserves the right to withhold the statements of any particular witnesses  
4 it deems necessary until after the witness testifies. Otherwise, the government will disclose the  
5 statements of witnesses at the time of the filing of the government's trial memorandum, provided  
6 that defense counsel has complied with Defendant's obligations under Federal Rules of Criminal  
7 Procedure 12.1, 12.2, and 16 and 26.2 and provided that defense counsel turn over all "reverse  
8 Jencks" statements at that time.

9  
10 f. The Government Objects To The Full Production Of Agents' Handwritten  
Notes At This Time

11 Although the government has no objection to the preservation of agents' handwritten notes,  
12 it objects to requests for full production for immediate examination and inspection. If certain  
13 rough notes become relevant during any evidentiary proceeding, those notes will be made  
14 available.

15 Prior production of these notes is not necessary because they are not "statements" within  
16 the meaning of the Jencks Act unless they comprise both a substantially verbatim narrative of a  
17 witness' assertions *and* they have been approved or adopted by the witness. United States v.  
18 Spencer, 618 F.2d 605, 606-607 (9th Cir. 1980); see also United States v. Griffin, 659 F.2d 932,  
19 936-938 (9th Cir. 1981).

20 g. All Investigatory Notes and Arrest Reports

21 The government objects to any request for production of all arrest reports, investigator's  
22 notes, memos from arresting officers, and prosecution reports pertaining to Defendant. Such  
23 reports, except to the extent that they include Brady material or the statements of Defendant, are  
24 protected from discovery by Rule 16(a)(2) as "reports . . . made by . . . Government agents in  
25 connection with the investigation or prosecution of the case."

1 Although agents' reports may have already been produced to the defense, the government  
2 is not required to produce such reports, except to the extent they contain Brady or other such  
3 material. Furthermore, the government is not required to disclose all evidence it has or to render  
4 an accounting to Defendant of the investigative work it has performed. Moore v. Illinois, 408 U.S.  
5 786, 795 (1972); see United States v. Gardner, 611 F.2d 770, 774-775 (9th Cir. 1980).

6 h. Expert Witnesses.

7 Pursuant to Fed. R. Crim. P. 16(a)(1)(G), at or about the time of filing its trial  
8 memorandum, the government will provide the defense with notice of any expert witnesses the  
9 testimony of whom the government intends to use under Rules 702, 703, or 705 of the Fed. R. of  
10 Evidence in its case-in-chief. Such notice will describe the witnesses' opinions, the bases and the  
11 reasons therefor, and the witnesses' qualifications. Reciprocally, the government requests that the  
12 defense provide notice of its expert witnesses pursuant to Fed. R. Crim. P. 16(b)(1)(C).

13 i. Information Which May Result in Lower Sentence.

14 Defendant has claimed or may claim that the government must disclose information about  
15 any cooperation or any attempted cooperation with the government as well as any other  
16 information affecting Defendant's sentencing guidelines because such information is discoverable  
17 under Brady v. Maryland. The government respectfully contends that it has no such disclosure  
18 obligations under Brady.

19 The government is not obliged under Brady to furnish a defendant with information which  
20 he already knows. United States v. Taylor, 802 F.2d 1108, 1118 n.5 (9th Cir. 1986), cert. denied,  
21 479 U.S. 1094 (1987); United States v. Prior, 546 F.2d 1254, 1259 (5th Cir. 1977). Brady is a rule  
22 of disclosure. There can be no violation of Brady if the evidence is already known to Defendant.

23 Assuming that Defendant did not already possess the information about factors which  
24 might affect their respective guideline range, the government would not be required to provide  
25 information bearing on Defendant's mitigation of punishment until after Defendant's conviction  
26 or plea of guilty and prior to his sentencing date. "No [Brady] violation occurs if the evidence is  
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disclosed to the defendant at a time when the disclosure remains of value.” United States v. Juvenile Male, 864 F.2d 641 (9th Cir. 1988).

Defendant is hereby notified that the Government intends to use in its case-in-chief at trial all evidence which Defendant is entitled to discover under Rule 16, subject to any relevant limitations prescribed in Rule 16.

**B. MOTION TO COMPEL NOTICE PURSUANT TO FED. R. CRIM. P. 12(b)(4)(B)**

Defendant is hereby notified that the Government intends to use in its case-in-chief at trial all evidence which Defendant is entitled to discover under Rule 16, subject to any relevant limitations prescribed in Rule 16. Additionally at the appropriate time, the Government will file a trial memorandum detailing the evidence the Government intends to use during its case in chief.

**C. THE GRAND JURY INSTRUCTIONS WERE NOT FAULTY, AND THE INDICTMENT SHOULD NOT BE DISMISSED**

**1. The Indictment Properly Alleges All Necessary Elements of the Charged Offense**

Defendant alleges that the indictment must be dismissed under United States v. Salazar-Lopez, 506 F.3d 748 (9th Cir. 2007), because it fails to allege either a removal subsequent to a conviction or a specific date of the prior removal. [Def. Motion 7.] Defendant here is mistaken, as Salazar-Lopez approves of the language that is found in the indictment against this Defendant. Specifically, the Ninth Circuit stated that “the date of the removal, or at least the fact that [Defendant] had been removed after his conviction, should have been alleged in the indictment and proved to the jury.” Id. at 752 (emphasis added). The indictment addressed by the Ninth Circuit in Salazar-Lopez did not have the requisite language, and therefore the Court performed a harmless error analysis. Id. at 752-755. Here, however, the indictment expressly states: “It is further alleged that defendant GILBERTO PLACENCIA-MEDINA was removed from the United States subsequent to June 26, 2006.” Defendant’s motion should therefore be denied.

1                   **2. The Indictment Does Not Violate Defendant's Right to Presentment**

2                   Defendant's second argument is that the indictment violates his rights under the Fifth  
3 Amendment's Presentment Clause. Defendant claims that: (1) there is no indication that the grand  
4 jury "was charged with the legal meaning of the word 'removal' . . . as opposed to being simply  
5 removed from the United States in a colloquial sense"; and (2) that the Government may, at trial,  
6 rely on a deportation that was never presented to the grand jury. (Def. Mot. at 8-10). Defendant's  
7 claims lack merit.

8                   In the first place, Defendant has no basis arguing that the Government might try to offer  
9 evidence of a removal that differs from the one presented to the grand jury, much less that this  
10 would be improper. As the Court is aware, Defendant's argument is undercut by the fact that the  
11 Government often presents evidence in § 1326 prosecutions of multiple deportations. This  
12 longstanding practice belies Defendant's claim that the Government is limited to proving one  
13 deportation and that this particular deportation must be presented to the grand jury. Even apart  
14 from that practice, it is not at all clear that an element of § 1326 is the *date* of a deportation rather  
15 than the *fact* of deportation itself. If Covian-Sandoval, 462 F.3d at 1097-98, does not hold that the  
16 date is an element of the offense, then the Presentment Clause is not even implicated. In any event,  
17 this is a moot point, as the Government has produced discovery showing precisely when Defendant  
18 was removed from the United States subsequent to June 26, 2006—the date alleged in the  
19 indictment.

20                   Furthermore, the Court should reject Defendant's motion to dismiss the indictment based  
21 on his speculation regarding the adequacy of the instructions to the grand jury regarding legal terms  
22 such as "removal" or "deportation." The U.S. Supreme Court has held that the Fifth Amendment  
23 right not to be tried for a crime not presented to a grand jury is triggered by "only a defect so  
24 fundamental that it causes the grand jury no longer to be a grand jury, or the indictment no longer  
25 to be an indictment." Midland Asphalt Corp. v. United States, 489 U.S. 794, 802 (1989). If a  
26 grand jury returns an indictment when there is insufficient evidence to indict, the greatest safeguard  
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1 is the petit jury and the rules governing its determination of guilty. United States v. Sears,  
2 Roebuck & Co., 719 F.2d 1386, 1392 n.7 (9th Cir. 1983). An accused's *only* cognizable interest  
3 in grand jury proceedings—and thus the *only* interest that courts can vindicate by dismissing an  
4 indictment on constitutional grounds—is the right to have a legally constituted grand jury make  
5 an informed and independent evaluation of the evidence to determine if there is probable cause to  
6 believe him guilty of a crime. Id. (citing United States v. Wright, 667 F.2d 793, 796 (9th Cir.  
7 1982) (assuming erroneous grand jury instructions but still refusing to dismiss indictment)). The  
8 defendant must show that the prosecutor's conduct was "so flagrant" that it deceived the grand jury  
9 in a significant way, thereby infringing on its ability to exercise independent judgment. See  
10 Wright, 667 F.2d at 796.

11 In United States v. Kenny, 645 F.2d 1323 (9th Cir. 1981), the Ninth Circuit rejected the  
12 defendant's request to dismiss the indictment on the basis of his allegation that the grand jury  
13 returned a true bill without any instruction on the applicable law. The Court stated that it was "not  
14 persuaded that the Constitution imposes the additional requirement that grand jurors receive legal  
15 instructions" and warned that "the giving of such instructions portends protracted review of their  
16 adequacy and correctness." Id. at 1347.

17 In this case, Defendant seeks to accomplish precisely what Kenny warned of. Namely, he  
18 wishes for this Court to review the adequacy and correctness of any instruction to the grand jury.  
19 The Court cannot and should not do so. This is particularly true considering that even if there was  
20 evidence—rather than Defendant's mere speculation—that the grand jury was not instructed on  
21 an element of the offense, this would not be sufficient grounds to compel the dismissal of the  
22 indictment. See United States v. Larrazolo, 869 F.2d 1354, 1359 (9th Cir. 1989), overruled on  
23 other grounds by Midland Asphalt, 489 U.S. at 799-800.

24 Defendant does not and cannot credibly allege that the Government attempted to mislead  
25 the grand jury. Furthermore, there is no basis to suppose that the grand jury was impaired in its  
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1 ability to independently evaluate the evidence. As Defendant offers nothing but speculation to  
2 support his motion to dismiss, it should be denied.

3 **3. Defendant Has Not Demonstrated that the Grand Jury was Misinstructed**

4 Defendant argues that the grand jury was misinstructed in two distinct ways, yet articulates  
5 no basis for these assertions. As such, his motion to dismiss the indictment on this ground should  
6 also be denied.

7 **D. NO OPPOSITION TO LEAVE TO FILE FURTHER MOTIONS**

8 The United States does not object to the granting of leave to allow Defendant to file further  
9 motions, as long as the order applies equally to both parties and additional motions are based on  
10 newly discovered evidence or discovery provided by the United States subsequent to the instant  
11 motion at issue.

12 **IV**

13 **CONCLUSION**

14 For the foregoing reasons, the government respectfully requests that Defendant's motions,  
15 except where not opposed, be denied.

16  
17 DATED: July 24, 2008.

18 Respectfully submitted,

19 KAREN P. HEWITT  
20 United States Attorney

21 s/ W. Mark Conover  
22 W. MARK CONOVER  
23 Assistant United States Attorney  
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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff

v.

MANLEY SMITH (2),

Defendant(s).

Case No. 08CR1916-JM

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, W. MARK CONOVER, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of UNITED STATES' RESPONSE TO DEFENDANT'S MOTIONS on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

1. Jason Serr, Esq.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 24, 2008.

s/ W. Mark Conover  
W. MARK CONOVER